Shamugam v Pappah

HIGH COURT (PENANG) — CIVIL SUIT NO 365 OF 1983
EDGAR JOSEPH JR SCJ
5 JULY 1993

Civil Procedure *— Mode of commencement — Declaration of legitimacy — Whether proper mode was by way of petition — Whether failure to comply with mode of commencement of proceedings deemed to be waived and treated as mere irregularity not nullifying proceedings — Legitimacy Act 1961 ss 4 & 5*

Succession *— Distribution of estates — Legitimate children — Whether plaintiff entitled to succeed to deceased's estate — Whether plaintiff was legitimate child of deceased — Legitimacy Act 1961 ss 4 & 5*

Family Law *— Marriage — Validity of marriage — Whether defendant was lawful wife and widow of deceased — Civil Marriage Ordinance 1952 ss 4(2) & 6*

Evidence *— Hearsay — Statement by deceased as to relationship — Whether admissible as evidence of parentage — Whether exception to hearsay rule — Conditions to be satisfied before exception may be invoked — Evidence Act 1950 s 32(e)*

The plaintiff claimed a declaration that he was the only legitimate child of one S Kanapathy s/o Sinnathamby ('the deceased'), and as such, was the sole beneficiary of the estate of the deceased under the Distribution Act 1958. He further claimed a declaration that the defendant and her three children were not the lawful wife and legitimate children of the deceased, respectively, and as such, not entitled to any share in the estate of the deceased. On the other hand, the defendant alleged that she was the lawful widow of the deceased, and that there were three children of the marriage. The defendant further denied that the plaintiff was the son of the deceased because his natural father was the younger brother of the deceased. Accordingly, the defendant contended that the plaintiff was not entitled to any share in the estate of the deceased and so his claim should be dismissed.

A preliminary objection had been raised by counsel for the defendant after the conclusion of the hearing on the merits, that: (i) the procedure adopted by the plaintiff in commencing these proceedings by way of writ was wrong and the plaintiff should have proceeded by way of petition; and (ii) the court had no jurisdiction to adjudicate on the issues of legitimacy and marriage.

Held, dismissing both claims:

(1) The plaintiff was not claiming that he became or had become a legitimated person within the meaning of s 4 of the Legitimacy Act 1961 and therefore s 5 of the Legitimacy Act 1961 did not apply. Furthermore, it was far too late for the defendant to take any objection as to the form of commencement of proceedings. She had entered an unconditional appearance, filed a defence,

A both sides had adduced evidence in support of their respective cases and final submissions in writing had been put in. The failure to comply with the requirements of any rules in beginning proceedings must be deemed to have been waived and treated as a mere irregularity not nullifying the proceedings. This branch of the defendant's preliminary objection was overruled.

B (2) The plaintiff had the burden of establishing that he was the legitimate son of the deceased. In order to establish his right to succeed to the estate of the deceased who died intestate, the plaintiff must not only prove that he was the son of the deceased but must, by reason of the Distribution Act 1958, also prove that

C he was the legitimate son of the deceased. Likewise the burden of proof was on the defendant to establish that she was the lawful widow and relict of the deceased and that her three children were the children of her marriage to the deceased.

(3) The statutory declaration purportedly sworn by the deceased in

D order to obtain an identity card for the plaintiff satisfied all the requirements of s 32(e) of the Evidence Act 1950 and was rightly admitted in evidence. However, although the plaintiff had established that he was the son of the deceased, he had failed to establish that he was the legitimate son of the deceased and so had no right to succeed to the estate of the deceased.

E (4) The defendant's marriage to another man on 16 November 1966 was solemnized before the defendant's purported marriage to the deceased on 6 September 1967, and was dissolved only in 1983. The defendant was not the lawful widow and relict of the deceased and, even if her children were the children of the deceased, they

F were not his legitimate children, so that neither the defendant nor her children were entitled to succeed to the estate of the deceased.

Per curiam:

It would have been more appropriate for either the plaintiff or the defendant to have applied by way of petition for a grant of letters of

G administration to the estate of the deceased and for the opposite party to have entered a caveat, whereupon the judge could direct that an issue be tried.

[Bahasa Malaysia summary

H Plaintif menuntut suatu declarasi bahawa beliau merupakan anak sahtaraf yang tunggal kepada S Kanapathy s/o Sinnathamby ('simati'), dan oleh itu, merupakan benefisiari tunggal harta pusaka simati di bawah Akta Pembahagian 1958. Beliau selanjutnya menuntut suatu declarasi bahawa defendan dan tiga orang anaknya masing-masing

I bukan isteri dan anak sahtaraf simati, dan dengan demikian, tidak berhak mendapat sebarang bahagian dalam harta pusaka simati. Sebaliknya, defendan mengatakan bahawa beliau merupakan balu sah simati dan terdapat tiga orang anak daripada perkahwinan itu.

Defendan selanjutnya menafikan bahawa plaintif adalah anak lelaki simati kerana bapa sebenarnya adalah adik simati. Dengan demikian, defendan menyatakan bahawa plaintif tidak berhak mendapat sebarang bahagian dalam harta pusaka simati dan tuntutannya sepatutnya ditolak. A

Suatu bantahan permulaan telah ditimbulkan oleh peguambela defendan selepas pendengaran merit kes ini, bahawa: (i) prosedur yang diikut oleh plaintif apabila memulakan prosiding melalui writ adalah salah dan plaintif sepatutnya memulakan tindakan melalui petisyen; dan (ii) mahkamah tidak mempunyai bidang kuasa untuk mendengar isu mengenai sahtaraf dan perkahwinan. B

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Diputuskan, menolak kedua-dua tuntutan:

(1) Plaintif tidak menuntut bahawa beliau menjadi atau telah menjadi orang disahtaraf mengikut maksud s 4 Akta Kesahtarafaran 1961 dan oleh itu s 5 Akta Kesahtarafaran 1961 tidak terpakai. Lebih-lebih lagi, adalah terlalu lewat untuk defendan membuat bantahan terhadap bentuk permulaan prosiding; beliau telah memasukkan kehadiran tidak bersyarat, memfailkan pembelaan, kedua-dua pihak telah mengemukakan keterangan untuk menyokong kes masing-masing, dan penghujahan akhir bertulis telah dikemukakan. Kegagalan mengikut keperluan sebarang kaedah mengenai permulaan prosiding mesti dianggap telah diabaikan dan disifatkan sebagai suatu luar aturan yang tidak membatalkan prosiding. Cabang bantahan permulaan defendan ini ditolak. D E

(2) Plaintif menanggung beban untuk membuktikan bahawa beliau merupakan anak sahtaraf simati. Untuk membuktikan haknya untuk mewarisi harta pusaka simati yang meninggal tidak berwasiat, plaintif mesti membuktikan bukan sahaja bahawa beliau adalah anak simati tetapi mestilah juga membuktikan, disebabkan Akta Pembahagian 1958, bahawa beliau adalah anak sahtaraf simati. Beban membukti juga terletak pada defendan untuk membuktikan bahwa beliau adalah balu sah simati dan bahawa tiga orang anaknya merupakan anak daripada perkahwinannya kepada simati. F G

(3) Akuan berkanun yang kononnya telah diperakui oleh simati supaya mendapatkan kad pengenalan untuk plaintif memuaskan semua keperluan s 32(e) Akta Keterangan 1950 dan telah diterima dengan betul dalam keterangan. Akan tetapi, walaupun plaintif telah membuktikan bahawa beliau adalah anak kepada simati, beliau gagal membuktikan bahawa beliau adalah anak sahtaraf simati dan oleh itu tidak berhak mewarisi harta pusaka simati. H

(4) Perkahwinan defendan kepada seorang lelaki yang lain pada 16 November 1966 telah diupacarakan sebelum perkahwinannya kepada simati yang dikatakan itu pada 6 September 1967, dan hanya dibubarkan pada tahun 1983. Defendan tidak merupakan balu sah simati dan jikapun anak beliau merupakan anak simati, mereka bukanlah anak simati yang sahtaraf, dan oleh itu defendan begitu pun anaknya, tidak berhak mewarisi harta pusaka simati. I

Per curiam:
Adalah lebih sesuai jika plaintif ataupun defendan telah memohon melalui petisyen untuk suatu surat mentadbir harta pusaka simati dan untuk pihak yang bertentangan memasukkan suatu kaveat, dan seterusnya hakim boleh memerintahkan supaya sesuatu isu dibicarakan.]

Notes
For cases on admissibility of hearsay statements as to relationships, see 7 *Mallal's Digest* (4th Ed) paras 839–842.

Cases referred to
1 *In the Estate of Abraham Penhas (decd); Tan Soo Eng (widow) v Isaac Penhas* [1949] MLJ 223 (refd)
2 *Then Kang Chu v Tan Kim Hoe* [1926] SSLR 1 (distd)
3 *Hazura Singh v Mohindar Singh* (1937) 18 Lah 732 (refd)
4 *Prabhakar v Sarubai* (1943) Nag 779 (refd)

Legislation referred to
Civil Marriage Ordinance 1952 ss 4(2), 6
Evidence Act 1950 s 32(e)
Legitimacy Act 1961 ss 4, 5

R Rajasingam (*R Rajasingam & Co*) for the plaintiff.
VM Ravi (*VM Mohan*) for the defendant.

Edgar Joseph Jr SCJ: In this case, the plaintiff, Shamugam s/o S Kanapathy, in effect, claimed a declaration that he is the only legitimate child of one S Kanapathy s/o Sinnathamby deceased ('the deceased'), who died on 1 May 1983, leaving behind no other next of kin, that as such, he is the sole beneficiary of the estate of the deceased and, so, entitled to the whole of such estate under the Distribution Act 1958. He further claimed a declaration that the defendant, Pappah d/o Chinniah Nadar, and her three children, are not the lawful wife and legitimate children of the deceased, respectively, and as such, not entitled to any share in the estate of the deceased.

Other reliefs prayed for by the plaintiff were as follows:

8 (c) an order that the defendant do forthwith render an account to the plaintiff of any of the assets of the estate of the said S Kanapathy s/o Sinnathamby, deceased, come to her hands or possession and payment over by the defendant to the plaintiff forthwith of any money unlawfully and illegally received or collected by the defendant;

(d) an interim injunction forthwith restraining the defendant and her agents or servants from in any way applying for or obtaining letters of administration to the estate of the plaintiff's said father S Kanapathy s/o Sinnathamby, deceased, until after the trial of this action or until the further order of this honourable court;

(e) an interim injunction forthwith restraining the defendant and her agents or servants from in any way soliciting for payments or receiving the payments or any of them from the State Government of Perak or its agencies for the

supply of toddy by the plaintiff's said father S Kanapathy s/o Sinnathamby, deceased, during his lifetime to the State Government of Perak or its agencies until after the trial of this action or until the further order of this honourable court;

(f) an interim injunction forthwith restraining the defendant and her agents or servants from in any way dealing with the assets of the estate of the plaintiff's said father S Kanapathy s/o Sinnathamby, deceased, until after the trial of this action or until the further order of this honourable court; and

(g) an order that all moneys payable by the State Governments of Perak and Penang and their agencies in respect of toddy supplied by the plaintiff's said father during his lifetime be paid to the plaintiff above-named as the sole legal next of kin and beneficiary to this estate.

On the other hand, the defendant alleges that she is the lawful widow of the deceased, whom she married on 6 August 1967, and that there are three children of this marriage, namely, Santhi, Krishna Veni and Vengal Valanattan. The defendant further denies that the plaintiff is the son of the deceased because his natural father is one Ramiah Nadar, the younger brother of the deceased. Accordingly, the defendant contends that the plaintiff is not entitled to any share in the estate of the deceased and so his claim should be dismissed.

A preliminary objection had been raised by counsel for the defendant in his written submission though only after the conclusion of the hearing on the merits — that the procedure adopted by the plaintiff in commencing these proceedings by way of writ is wrong and that, in any event, the court has no jurisdiction to adjudicate on the issues of legitimacy and marriage.

As regards the objection to the procedure adopted by the plaintiff, counsel for the defendant has contended that the plaintiff should have proceeded by way of petition under s 5 of the Legitimacy Act 1961, which provides:

(1) A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may, whether domiciled in Malaysia or elsewhere, apply by petition to the High Court praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, or that his parent or remoter ancestor was legitimate; and the High Court shall have jurisdiction to hear and determine the application and to make a decree declaratory of the legitimacy or illegitimacy of that person as to the Court may seem just; and that decree shall be binding to all intents and purposes on all persons whomsoever.

(2) Every petition under this section shall be accompanied by such affidavit verifying the facts alleged in the same, and by such proof of the absence of fraud or collusion, as the Court may by any general rule direct.

(3) In all proceedings under this section the Court shall have full power to award and enforce payment of costs to any person cited, whether that person shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that the costs should be paid.

(4) A copy of every petition under this section, and of the affidavit accompanying the same, shall, not less than one month before the filing thereof, be delivered to the Attorney General, who shall be a respondent upon the

A hearing of the petition and upon every subsequent proceeding relating thereto.

(5) Where any application is made under this section to the Court, such person or persons (if any) besides the Attorney General as the Court shall think fit shall, subject to the rules made under this section, be cited to see proceedings, or otherwise summoned in such manner as the Court shall direct, and may B be permittted to become parties to the proceedings, and oppose the application.

In my view, the plaintiff here is not claiming that he became or has become a legitimated person, within the meaning of s 4 of the Legitimacy Act 1961, which provides:

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> Subject to section 3, where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date of the marriage, whichever be the later.

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I therefore rule that s 5 of the Legitimacy Act 1961 is without application in the present case, and so, this branch of the defendant's preliminary objection is overruled.

In any event, it is far too late in the day for the defendant to take any objection as to procedure relating to the form of commencement of E proceedings; she had entered an unconditional appearance, filed a defence, both sides had adduced evidence in support of their respective cases and final submissions in writing have been put in. In my view, therefore, the failure to comply with the requirements of any rules in beginning proceedings (if any) must be deemed to have been waived, and such failure (if any) F should be treated as a mere irregularity not nullifying the proceedings. (See O 2 r 1(1) of the Rules of High Court 1980 ('the RHC').)

Having said that, I agree that it would have been more appropriate for either the plaintiff or the defendant to have applied by way of petition for a grant of letters of administration to the estate of the deceased and for the opposite party to have entered a caveat, whereupon the judge could direct G that an issue be tried. (See, eg in the *Estate of Abraham Penhas (decd), Tan Soo Eng (widow) v Isaac Penhas.*[1]) In this context, I would draw attention to the detailed procedure provided for in non-contentious as well as contentious probate proceedings in O 71 and O 72 of the RHC.

As regards the second objection of counsel for the defendant which H challenged the jurisdiction of this court to adjudicate on the issues of legitimacy and validity of the alleged marriage between the defendant and the deceased, reliance was placed by counsel on the case of *Then Kang Chu v Tan Kim Hoe.*[2]

In my view, *Then Kang Chu*'s case[2] does not assist the defendant. In that case, the respondent had in March 1924 applied to a magistrate under s 38 I of Ordinance No 96 (Minor Offences) for an order for maintenance against the appellant, whom she alleged to be her husband. The magistrate refused to make an order on the ground that the respondent had failed to prove that

she was the wife of the appellant. She therefore commenced an action in the Supreme Court claiming a declaration that she was the wife of the appellant and therefore entitled to maintenance. The court declared that she was the secondary wife of the appellant and entitled to maintenance. A

On appeal, the point was taken for the first time that the Supreme Court had no jurisdiction to entertain a suit for a declaration of the validity of a marriage. B

It was held that the Supreme Court has no jurisdiction to entertain a suit for a declaration of the validity of a marriage and no jurisdiction to entertain an application under s 38 of Ordinance No 96 (Minor Offences) except by way of appeal or revision.

The circumstances in *Then Kang Chu*'s case[2] are therefore poles apart from those of the present case and I do not therefore consider it to be of any assistance to me. C

I must now consider the suit on its merits.

To recapitulate, each side has challenged the right of the other to succeed to the estate of the deceased; the plaintiff alleges that he is the only legitimate son and sole heir of the deceased whilst the defendant was never lawfully married to the deceased, so that he alone is entitled to succeed to the estate of the deceased. On the other hand, the defendant alleges that she is the lawful widow and relict of the deceased having been lawfully married to the deceased according to Hindu rites and that her three children are the children of that marriage, so that only she and her three children are entitled to succeed to the estate of the deceased. D E

The plaintiff has the burden of establishing his parentage; that is to say that he is the legitimate son of the deceased and one Mdm Amirtham Ammal. But the burden of proof is on the defendant to establish that she is indeed the lawful widow and relict of the deceased and that her three children are the children of her marriage to the deceased. F

I shall take firstly the case for the plaintiff.

The plaintiff testified on his own behalf. He called no witnesses.

He began by saying that he was 42 years of age, having been born on 4 April 1949 in the village of Vanakaruppu in the Ramanad District of India. He said his parents were the deceased and Amirtham Ammal. He further said that his father, the deceased, had emigrated to Malaya when he was a little child, leaving him and his mother in India to stay in the house of his paternal uncle Ramasamy. G

He added that whilst in Malaya, the deceased used to remit money to his paternal uncle for his maintenance.

The plaintiff went on to say that in 1958, his uncle found him uncontrollable and therefore wrote two letters to his father in Tamil (P3 and P4) stressing this fact. These letters also suggest that the deceased used to remit money for the support of the plaintiff. As a result, the plaintiff was brought to Malaya by his mother and they both lived with the deceased in Dublin Estate, Kedah. The plaintiff was then ten years of age and that was when he first recalled seeing the deceased. H I

The plaintiff also produced an emergency certificate of entry dated 29 October 1959, issued by the regional passport officer, Madras, and also

an entry permit, dated 6 January 1960, issued by the Malaysian Immigration Department, being P6 and P7, respectively.

Counsel for the defendant did not object to the admissibility of P6 and P7 though he did object to the admissibility of p 1 of P6 which contained a summary as follows:

> That Amirtham Ammal has stated to me that her son is a citizen of India and that I have no reason to doubt her statement.
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> | | |
> |---|---|
> | Father's name: | Ganapathy |
> | Place and date of birth: | Vanakaruppu Ramanathaipuram District, 1949 |
> | Address in India: | Vanakaruppu Village Penyukottai PO Ramanathapurnam District |
> | Colour of eyes and hair: | scar on left eyebrow |

Though I had overruled the objection, reflection reveals that there is substance in the objection. The contents of p 1 of P6, except for the reference to the scar on the left eyebrow, must undoubtedly have been derived from statements made by Amirtham Ammal who was not called to testify and as such are plainly hearsay and inadmissible. I agree, however, that the rest of exh P6 is admissible.

It follows that exh P6 does not by itself establish the paternity of the plaintiff and, certainly, it does not by itself establish that the deceased was the father of the plaintiff. I am satisfied, however, that P6 does relate to the plaintiff and that he is the person referred to as Shinmugam therein and, together with the entry permit issued by the Malaysian Immigration Department (exh P7), tend to confirm the plaintiff's testimony that he did leave India for Penang, arriving there on 6 January 1960. The plaintiff also indicated in open court the scar he bears on his left eyebrow.

Counsel for the defendant had objected to the admissibility of the two letters, P3 and P4, on the ground that it was hearsay, the uncle not having been called to testify. Counsel for the plaintiff replied that he would comply with s 32 of the Evidence Act 1950. I overruled the objection subject to compliance with s 32 of the Evidence Act 1950.

At the end of the day, however, no attempt had been made to comply with the strict requirements of s 32; not even the prerequisites of that section, let alone any of the exceptions laid down therein. In my view, therefore, these letters are inadmissible in evidence being hearsay, and I rule that they are worthless as evidence.

To continue the plaintiff's narrative of events, he testified that on 9 March 1964, the deceased swore a statutory declaration to obtain an identity card for him and that, in consequence, he was duly issued a red NRIC 7913404. The plaintiff then produced a certified copy of that statutory declaration and, there being no objection by counsel for the defendant, it was duly admitted and marked as an exhibit (see P8). The plaintiff did not however produce his NRIC in court for inspection nor did he produce a certified copy thereof. But, more importantly, he did *not* produce his birth certificate.

On the other hand, the defendant produced a birth certificate issued by the Department of Revenue Government of Tamil Nadu, which purported to be the birth certificate of the plaintiff issued pursuant to s 17 of the

Registration of Births and Deaths Act 1969, wherein it appears that one Shanmugam was born on 22 July 1952, in Periakottai, whose father and mother are named as Ramiah Nadar and Sowdaram, respectively. (See exh D11.)

An endorsement on D11 states: 'Birth of the male child registered upon the orders of the chief judicial magistrate, Sinagangu, in Misc Petition No 211/87 dated 5 February 1987.'

In my opinion, there is insufficient evidence to establish that the person referred to as Shamugam in D11 is the plaintiff, and I therefore disregard D11.

Turning to the statutory declaration which purports to have been made by the deceased, it reads as follows:

> Statutory declaration
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> I, Kanapathy s/o Sinnathamby the holder of National Registration Identity Card No 3932354 of Maryland Div, Dublin Estate, Karangan, Kedah do solemnly and sincerely declare that, my son Shanmugam s/o Kanapathy was born at Vanakaruppu Village, Ramanathapuram District, South India on 4 April 1949. I am filing this solemn declaration to enable me to obtain an identity card for my son above-named.
>
> And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Stautory Declarations Act 1960.
>
> Subscribed and solemnly declared by the above-named Kanapathy s/o Sinnathamby of Maryland Div, Dublin Estate, Karangan Kedah at the magistrates' court at Kulim in the State of Kedah this 19 March 1964. —Sgd— (Illegible)
>
> Before me
> —Sgd—
> Magistrate
> Kulim, Kedah

It was argued by counsel for the defendant that the contents of this statutory declaration were hearsay and therefore inadmissible.

The fifth exception to the hearsay rule provided for under s 32(e) of the Evidence Act 1950 is as follows:

> Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
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> ...
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> (e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised; ...

but subject to proof of the identity of the maker of the statement. (See *Hazura Singh v Mohindar Singh.*[3])

A It follows that the four conditions must be satisfied before the exception contained in s 32(e) can be successfully invoked. They are:

Firstly, the statement, written or verbal, of relevant facts must have been made by a person who is dead or cannot be found, etc, as required under the prerequisite requirements of s 32; secondly, the statement must relate to the existence of any relationship by blood, marriage or adoption; thirdly, B the person making the statement must have special means of knowledge as to the relationship in question; and lastly, the statements must have been made before the question in dispute arose.

In the case of members of the family, a special knowledge is to be presumed. (See *Prabhakar v Sarubai.*[4])

C I am satisfied that the plaintiff has satisfied all the requirements of s 32(e), and that exh P8 was rightly admitted in evidence, for the purpose of proving paternity, that is to say, for the purpose of proving that the deceased was the father of the plaintiff.

The question, what weight should be given to exh P8 is a separate question from its admissibility.

D The defendant has attempted to pour scorn on P8 by alleging that the plaintiff is the son of Ramiah Nadar, the younger brother of the deceased. In this, she was supported by her cousin, Karrupiah s/o Pollaiyan (DW1). I do not propose to wade through their testimony on this point.

Suffice it to say that neither the defendant nor Karrupiah could possibly E have personal knowledge of facts relevant to this allegation. The allegation as to the paternity of the plaintiff is based on pure surmise, is hearsay and therefore worthless as evidence.

However, in order to establish his right to succeed to the estate of the deceased who died intestate, the plaintiff must by reason of the Distribution F Act 1958, go further and prove not only that he is the son of the deceased but also that he is the *legitimate* son of the deceased. Does the statutory declaration of the deceased prove this point?

In my opinion, even accepting P8 at its full face value, it does not. Nor, for that matter, does the emergency certificate, P6, assist the plaintiff on this point. It is true that P6 by para 1 does state: 'This is to certify that G Amirtham Ammal has stated to me that her son, Shanmugam, is a citizen of India and that I have no reason to doubt his statement.' But does this prove the maternity of the plaintiff? In my opinion, it does not, for the contents of para 1 of P8 as to what Amirtham Ammal allegedly said to the regional passport officer, namely, that Shanmugam is her son, is hearsay.

H None of the prerequisites of s 32 of the Evidence Act 1950 have been satisfied; that is to say, no attempt had been made to prove that Amirtham Ammal is dead or cannot be found, etc. Moreover, even if such proof had been adduced, so that exception (e) to s 32 could be invoked by the plaintiff, P6 would merely afford proof that Amirtham Ammal is his mother but not that she was married to the deceased and therefore his lawful widow I and relict.

I need hardly add that the plaintiff himself was in no position to testify that he was born or conceived during his mother's marriage to the deceased without infringing the hearsay rule.

It follows, therefore, that although the plaintiff has established that he is the son of the deceased, he has failed to establish that he is the legitimate son of the deceased and so he has no right to succeed to the estate of the deceased having regard to the provisions of the Distribution Act 1958, (Rev 1983), and I so declare.

I next turn to consider the case for the defendant.

The defendant testified that in September 1966, she had been brought to Malaysia from India by a relative named Tanakody and that to enable her to reside permanently here, she had married one Raman s/o Tanakody.

It is common ground that that marriage was solemnized on 16 November 1966 at the Registry of Civil Marriages, Kinta, in the State of Perak, pursuant to the Civil Marriage Act 1952, but was dissolved by the High Court, Ipoh, on 19 July 1983, following the grant of a decree nisi for dissolution on 20 June 1983 (exh D12) by 'mutual consent' upon the joint petition (exh P18) of the parties thereto.

The defendant, nevertheless, claims that she had married the deceased on 6 September 1967 at Dublin, Kulim, in the State of Kedah, according to Hindu customary rites. In support, the defendant called a witness, Raman Chitnari (DW2), who claimed that he was employed by the deceased as a driver and that he was present at the ceremony of marriage which was conducted by a Hindu priest. He added that he saw the deceased tie a 'tali' round the neck of the defendant. This may or may not be true but the difficulty with which the defendant is faced is that s 4(2) of the Civil Marriage Ordinance 1952, which was in force at the material time, provides:

> A female person married in accordance with the provisions of this Ordinance, shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person either as his principal or as his secondary wife.

Furthermore, s 6 of the Civil Marriage Ordinance 1952 provides:

> Every marriage duly solemnised under this Ordinance shall continue until dissolved in any of the following manner:
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> (a) by the death of one of the parties or
> (b) by order of a Court of competent jurisdiction or
> (c) by a declaration made by a Court of competent jurisdiction that the marriage is null and void.

The defendant's answer to this objection is that her marriage to Raman s/o Tanakody was one of convenience only to enable her to obtain permanent residence in this country and that it was never consummated with the result that it was null and void. In this, the defendant's testimony was corroborated by the testimony of Raman s/o Tanakody (DW3) himself.

But, the version of the defendant and Raman s/o Tanakody that the marriage was a sham and null and void for non-consummation is flatly contradicted by the contents of their own joint petition for divorce dated 9 June 1983 (P18) verified by affidavit and, in particular, para 3 thereof which reads:

A The petitioners have *cohabited* at No 9, Stall Jalan Pusing, Batu Gajah, Perak. (Emphasis added.)

The effect of the contradiction aforesaid, is, to my mind, virtually conclusive, if not conclusive, against their credibility. In other words, their credit, on the point concerned, is impeached.

B In any event, the effect in law of the decree of dissolution of marriage — *not*, be it noted, a decree of nullity — pronounced by the High Court, Ipoh, which was a court of competent jurisdiction, is to bar the defendant and Raman s/o Tanakody from alleging both by reason of res judicata and estoppel that their marriage was null and void for non-consummation.

I must therefore further declare that the defendant is not the lawful C widow and relict of the deceased and that, consequently, even if her three children are the children of the deceased they are not his legitimate children so that neither the defendant nor any of her children are entitled to succeed to the estate of the deceased who died intestate.

As both parties have failed in their attempt to establish their claims as to D entitlement to succeed to the estate of the deceased, I would make no order as to costs.

Claims dismissed.

Reported by Anne Khoo

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